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9 FRIENDS OF OCEANO DUNES, INC.

10 UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 FRIENDS OF OCEANO DUNES, INC.

14 Plaintiff,

15 vs.

16 U.S. DEPARTMENT OF THE INTERIOR, the  
17 UNITED STATES FISH AND WILDLIFE  
18 SERVICE, KEN SALAZAR, in his official  
19 capacity as Secretary of the Interior; and  
20 DANIEL M. ASHE, in his official capacity as  
21 Director, U.S. Fish and Wildlife Service,

22 Defendants,

Case No.:

**COMPLAINT RE FAILURE TO  
PRODUCE RECORDS AND GRANT  
FEE WAIVER IN VIOLATION OF  
THE FREEDOM OF INFORMATION  
ACT**

23 1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to  
24 order the Department of Interior and/or the U.S. Fish and Wildlife Service ("Federal Defendants")  
25 to produce responsive records and grant a fee waiver request pursuant to a FOIA request submitted  
26 by and on behalf of FRIENDS OF OCEANO DUNES, INC. ("FRIENDS"). Federal Defendants  
27 are unlawfully withholding responsive records and failed to issue a determination on Friends'  
28 request for a fee waiver.

## Jurisdiction and Venue

2. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and 28 U.S.C. § 1331 (federal question jurisdiction). Venue lies in this district under 5 U.S.C. § 552(a)(4)(B). FRIENDS' principal place of business and operations is in San Jose, California.

## Parties

3. Plaintiff, the FRIENDS OF OCEANO DUNES, Inc., ("FRIENDS") is a California not-for-profit corporation, focused on preserving public recreational opportunities at Oceano Dunes State Vehicular Area near Pismo Beach, California.

4. Defendants, the Department of the Interior ("DOI") and the U.S. Fish and Wildlife Service ("FWS") are agencies of the United States and have possession of the documents that Plaintiff seeks. They each are required by law to comply with FOIA. Defendants Ken Salazar and Daniel M. Ashe are the respective heads of those agencies, and, in that capacity, have ultimate responsibility for complying with FOIA. They are each sued in their respective official capacity.

## Claims

5. When a FOIA request is submitted, an agency shall make records "promptly available." 5 U.S.C. § 552(a)(3)(A).

6. By letter dated **August 22, 2012**, FRIENDS submitted a written FOIA request seeking access to "[a]ll documents, including emails, memos, notes or letters, to or from Gary D. Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service ("FWS") Assistant Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1, 2008 to the date of this FOIA request." Frazer has a decision-making or high level advisory role in the designation of

1 critical habitat for listed species. FRIENDS also requested a fee waiver under 5 U.S.C. §  
2 552(a)(4)(A)(iii), and set forth a detailed application for a fee waiver. A copy of the FOIA request  
3 and fee waiver is attached as Exhibit 1.

4 7. By letter dated August 23, 2012, the DOI's FOIA officer Clarice Julka acknowledged  
5 receipt of FRIENDS' FOIA request on August 23, 2012, and stated that they had "determined that  
6 U.S. Fish and Wildlife Service (FWS) **would likely have the records you are seeking.**"

8 8. On August 23, 2012, FWS FOIA officer Ray McLaughlin, acknowledged by e-mail the  
9 receipt of FRIENDS' FOIA request, and assigned the tracking number for this request: FWS-2012-  
10 01232. Mr. McLaughlin also stated that our FOIA request "will be forwarded to the appropriate  
11 program or office for direct response to you."

12 9. On October 2, 2012, FRIENDS' counsel emailed FWS FOIA officer Ray McLaughlin  
13 to inform him that it had "not received *any response* from Fish and Wildlife to this request."

14 10. The next day, October 3, 2012, FWS FOIA officer McLaughlin emailed FWS  
15 personnel Mary Klee, Helen Speights and Johnny Hunt on the issue of the status of FRIENDS'  
16 FOIA request, asking them to "send Mr. Roth the current status information for his request and let  
17 us know when you have responded."

18 11. On October 4, 2012, Mary Klee, FWS Biologist, emailed FRIENDS to state that FWS  
19 had completed its search for documents per FRIENDS' FOIA request and was currently  
20 "reviewing the responsive documents to determine if any of the information needs to be withheld."

21 12. On November 12, 2012, FRIENDS' counsel emailed FWS asking the status of the  
22 request. To date, FWS has failed to respond to that inquiry.

23 12. To date, no records have been produced and DOI/FWS has cited no lawful basis for  
24 withholding them.  
25  
26  
27  
28

1       13. To date, no determination has been rendered to FRIENDS on its request for a fee  
2 waiver.

3       14. 43 C.F.R. § 2.28 authorizes the filing of an administrative appeal to DOI when a  
4 record request is denied. On October 19, 2012, FRIENDS filed by email a timely administrative  
5 appeal of DOI/FWS's denial. A copy of is attached as Exhibit 2. Included in the administrative  
6 appeal were the contentions that the responsive documents were being unlawfully withheld and  
7 that DOI/FWS failed to issue a determination on FRIENDS' request for a fee waiver.  
8

9       15. Under DOI/FWS regulations, the agency must issue a decision on the FOIA  
10 administrative appeal within **20 business days of the filing**. 43 CFR § 2.32 (a) states "The  
11 statutory time limit for responding to an appeal is 20 workdays after receipt of an appeal . . . ."  
12 See also § 552(a)(6)(A)(ii). Twenty work days, excluding one federal holiday of Veterans Day,  
13 after October 19, 2012 is November 17, 2012. As of the date of this Complaint, the undersigned  
14 counsel has received no decision from DOI/FWS regarding FRIENDS' administrative appeal.  
15

16       16. 43 C.F.R. § 2.32 (c) provides that "[i]n the event that the Department is unable to  
17 reach a decision within the given time limits, the FOIA Appeals Officer will notify you of the  
18 reason for the delay and the right to seek judicial review." DOI/FWS failed to provide any such  
19 notification to the undersigned counsel.

20       17. 43 C.F.R. § 2.32 (c) also provides "[i]f you have not received a decision on your  
21 appeal within 20 workdays, you have the right to seek review in a District Court of the United  
22 States." FRIENDS is pursuing that legal right with this action.  
23

24       18. FOIA states that a requester "shall be **deemed to have exhausted** his  
25 administrative remedies . . . if the agency fails to comply with the applicable time limit  
26 provisions." 5 U.S.C. § 552(a)(6)(C)(i). Since DOI/FWS have failed to act in a timely manner on  
27 FRIENDS' administrative appeal, FRIENDS, by operation of law, is deemed to have exhausted its  
28



1 administrative remedies fully and need not await further action by DOI/FWS. Any subsequent  
2 administrative ruling by DOI/FWS will be of no force and effect. FRIENDS thus challenges the  
3 denial to release records by the DOI/FWS and their failure to issue a determination upon  
4 FRIENDS' fee waiver request.

5  
6 19. FOIA requires the FWS to state the reasons for withholding documents but it failed to  
7 provide any lawful reason in this case. Under FOIA, the federal agency is required to  
8 "immediately notify the person making such request of such determination and the reasons  
9 therefore..." 5 U.S.C. § 552(a)(6)(A)(i). FWS's refusal to provide responsive records (for any  
10 reason other than one of the enumerated statutory exemptions, which it has not asserted)  
11 constitutes unlawful withholding under FOIA. 5 U.S.C. § 552(d) ("This section does not authorize  
12 withholding of information or limit the availability of records to the public, except as specifically  
13 stated in this section."); 5 U.S.C. § 552(a)(4)(B) ("In such a case the court shall determine the  
14 matter de novo, and may examine the contents of such agency records in camera to determine  
15 whether such records or any part thereof shall be withheld under any of the exemptions set forth in  
16 subsection (b) of this section, and the burden is on the agency to sustain its action.")

17  
18 20. Since the FWS has failed to release any of the responsive records and has not stated  
19 that the documents are exempt from disclosure (and has failed to demonstrate that any exemption  
20 applies), FWS is withholding these records unlawfully in violation of FOIA.

21  
22 21. FOIA § 552(a)(6)(A)(i) requires the FWS/DOI to state a determination to the  
23 requester that includes a statement of documents released or withheld, the reasons for not releasing  
24 documents, and when a fee waiver is part of the request, whether a fee waiver is granted or denied,  
25 and if denied, the grounds.

26 22. 552(a)(4)(A)(iii) requires agencies to waive fees for requesters able to demonstrate that  
27 "disclosure of the information is in the public interest."  
28

24. FOIA 5 U.S.C. § 552(a)(4)(A)(vii) provides that "(vii) In any action by a requester  
regarding the waiver of fees under this section, the court shall determine the matter de novo:  
Provided, That the court's review of the matter shall be limited to the record before the agency."

25. A requester is deemed to have exhausted administrative remedies and may seek judicial review immediately if the agency fails to answer the request within twenty days. 5 U.S.C. § 552(a)(6)(C).

26. FOIA provides that a federal district court “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . .” § 552(a)(4)(B). In such a case, the “court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.” § 552(a)(4)(B).

27. Through this action, FRIENDS demands that the responsive records withheld be produced immediately and should FWS/DOI withhold any document, then FRIENDS demands that FWS/DOI provide a detailed account for each record being withheld explaining why it has not been produced. FRIENDS further demands that FWS/DOI grant the fee waiver request and produce all responsive records without charge to FRIENDS.

23 28. Through this action, FRIENDS also requests that the court "assess against the United  
24 States reasonable attorney fees and other litigation costs reasonably incurred" 5 U.S.C. §  
25 552(a)(4)(E).

27 WHEREFORE, Plaintiff requests that this Court:

- (1) Issue a Ruling finding the DOI/FWS record denial unlawful under FOIA;
- (2) Issue an Order to DOI/FWS to grant FRIENDS its fee waiver request in full.
- (3) Issue an Order to DOI/FWS requiring the production of all responsive records being withheld;
- (4) Alternatively, issue an Order to DOI/FWS requiring them to produce an index detailing the basis for withholding each of the records;
- (5) Award plaintiff costs and reasonable attorneys fees in this action, as provided in FOIA; and
- (6) Grant such other and further relief as may deem just and proper.

Dated: November 26, 2012

Respectfully submitted,

/s/

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Ex. 1 to Complaint



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August 22, 2012

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**Re: Freedom of Information Act (FOIA) Request**

Dear FOIA Officers and Coordinators:

This firm represents the Friends of Oceano Dunes ("Friends"), a California not-for-profit corporation, representing approximately 28,000 members and users

August 22, 2012

of the Oceano Dunes State Vehicular Recreation Area ("SVRA") located near Pismo Beach, California.

The critical habitat designation for the western snowy plover may impact recreational opportunities for Friends' 28,000 members and users of the Oceano Dunes SVRA. Friends is a public watchdog organization that has been monitoring the rule-makings that might affect this state park since 2001.

### **FOIA Request**

Pursuant to the Freedom of Information Act ("FOIA") and Department of Interior ("DOI") regulations, Friends hereby requests copies of the following documents:

(1) All documents, including emails, memos, notes or letters, to or from Gary D. Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service ("FWS") Assistant Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1, 2008 to the date of this FOIA request.

### **Fee Category**

The fee category for Friends is "other requesters." 43 C.F.R. Part 2 § 2.17 (a)(4).

### **Request to Begin Processing Immediately**

Friends is seeking a fee waiver for this request (see below). However, pursuant to DOI regulations, Friends is willing to pay regardless of whether a fee waiver is ultimately granted. According to the regulations, "this will permit the bureau to process your request for records at the same time it is considering the fee waiver request. If you are required to pay a fee, and it is later determined on appeal that you are entitled to a full or partial fee waiver, an appropriate refund will be made." 43 C.F.R. Part 2 § 2.8 (b)(2). Therefore, please commence processing of this request immediately.

### **Friends Requests A Fee Waiver**

FOIA mandates a fee waiver "shall be furnished" when, as here, "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." [5 U.S.C. § 552(a)(4)(A)(iii)]

Friends previously has been granted a fee waiver for related requests for FOIA documents underlying the FWS's 2005 and 2012 plover critical habitat rule-makings. In 2011, Friends also prevailed in U.S. District Court against FWS for its improper denial of a fee waiver request.

Here, Friends meets the two-prong fee waiver test, as well as the DOI fee waiver guidelines in 43 C.F.R. Appendix D to Part 2:

August 22, 2012

### **The Purpose of FOIA Is to Ensure the Right of Citizens to Be Informed About Governmental Actions and Operations.**

The purpose of FOIA "is to ensure an informed citizenry" which is "vital to the functioning of a democratic society" and to hold the government accountable. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Congress created a "judicially enforceable public right" to secure government documents. *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA protects citizens' "right to be informed about what their Government is up to," *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), and to ensure transparency in governmental activities. *Stern v. FBI*, 737 F.2d 84, 88 (D.C. Cir. 1984).

Congress implemented its intent by providing that a FOIA request may be made by "any person," 5 U.S.C. § 552(a)(3), a term that includes corporations such as Friends. *Judicial Watch of Fla., Inc. v. United States DOJ*, 102 F. Supp. 2d 6, 10 (D. D.C. 2000).

### **Congress Added the FOIA Fee Waiver Provision to Prevent Federal Agencies from Using Fees to Discourage Certain Types of Requesters and Requests.**

FOIA mandates that fees "shall" be waived or reduced in certain circumstances – specifically, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *Friends of the Coast Fork v. United States Dep't of Interior*, 110 F.3d 53, 54-55 (9th Cir. 1997).

The fee waiver provision was added in 1974 in "an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," particularly non-profit public interest groups. *Ettlinger v. Fed. Bureau of Investigation*, 596 F. Supp. 867, 872 (D. Mass. 1984) (citing Senate Comm. on the Judiciary, Amending FOIA, S. Rep. No. 93-854, at 10-19 (1974)). Because federal agencies continued to impose high fees as a tool to block certain requesters, Congress had to step in again in 1986. That year, Congress amended FOIA to ease the standards for non-commercial requesters to obtain a waiver. See 132 Cong. Rec. S14,298 (Sept. 30, 1986) (Sen. Leahy); see also *Judicial Watch*, 326 F.3d at 1315; *Institute for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1232 (D. Or. 2003) ("Congress intended . . . public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society."). According to Senator Leahy, one of the principal architects of the FOIA Amendment, the fee waiver amendment was necessary "to remove the roadblocks and technicalities . . . used by . . . Federal agencies to deny waivers . . . of fees under the FOIA." 132 Cong. Rec. S16,496 (Oct. 15, 1986) (Sen. Leahy); see, e.g., *Judicial Watch*, 326 F.3d at 1315; *Community Legal Servs. v. United States HUD*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 856 (D. Colo. 1994). Congress included the fee waiver provision in FOIA because it explicitly recognized the importance and the difficulty of access to governmental

August 22, 2012

documents for under-funded organizations and individuals. *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986).)

Thus, the fee waiver for non-commercial entities is a critical part of ensuring public disclosure of government activities. Federal agencies have a long and unfortunate history of using high fees to discourage FOIA requests, and Congress has amended the act previously to try to address federal agency resistance.

### **FOIA Establishes Only Two Requirements for a Fee Waiver**

Under FOIA, Congress mandates that requested records be “furnished without any charge” . . . “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Thus, FOIA only imposes two requirements for a fee waiver: (1) that the information sought “is not primarily in the commercial interest of the requester”; and (2) that the information sought is in the “public interest” because it is “likely to contribute significantly to the public understanding of the operations or activities of the government.” *Id.*

FWS has adopted regulations which purport to interpret FOIA by evaluating factors in determining whether an applicant is entitled to a fee waiver. 43 C.F.R. Appendix D, Part 2.

The DOI factors are largely duplicative and redundant of one another. To the extent that they add to or exceed the requirements established by FOIA itself, they are not valid. Courts are not bound by an agency’s interpretation of the FOIA fee waiver provision, especially to the extent that the interpretation conflicts with, or changes or adds to, the standard set by FOIA itself. *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (“we will not defer to an agency’s view of FOIA’s meaning. . .”).

As a general comment, the additional DOI standards are over-engineered, poorly drafted, add little or nothing meaningful to the analysis, and unduly burden the applicant.

### **Requirement No. 1: Friends’ FOIA Request Is Not Primarily in Its Commercial Interest**

Friends has no commercial interest that would be furthered by its FOIA request, or information obtained in that request.

Its FOIA request concerns communications to and from the head of the endangered species program so that Friends can understand more fully why FWS decided to re-impose critical habitat for the western snowy plover on areas that were previously excluded from the critical habitat designation.



August 22, 2012

Oceano Dunes SVRA was expressly established by the State of California as an area available to the public for off-road vehicle recreation, and is maintained by the California Department of Parks and Recreation specifically for that purpose. It is also one of the last areas on the California coast open to vehicles to drive on the beach.

Designating areas of Oceano Dunes SVRA as critical habitat has the potential either directly or indirectly to impede, limit or prevent off-road vehicle recreation. The designation is likely to be used by other state and local agencies that are hostile to off-road recreation at this location, or by purported environmental groups.

The area is heavily managed to protect plovers and critical habitat appears to add little or no additional protection while having a very large economic impact, and an impact on recreational uses that have been on-going for 100 years or more.

Friends of Oceano Dunes, Inc. is a California not-for-profit corporation established in 2001 "for the express purpose of preserving and developing recreational uses in the Oceano Dunes areas of San Luis Obispo County, California." (See Ex. A hereto.) Its members are individuals who use Oceano Dunes SVRA for off-road recreation, as the park was intended. No significant number of members has any commercial interest in the SVRA one way or another. They simply enjoy off-roading recreation at Oceano Dunes by themselves, or with friends and/or family.

Friends and its members are concerned about the western snowy plover rulemakings' impact on off road vehicle recreational opportunities. Friends' and its members' interest in the requested FOIA records is related simply to preserving their recreational activities and the public's recreational activities at Oceano Dunes SVRA. Friends has no commercial interest in the FOIA request whatsoever. As such, there is no argument that the request is "primarily in the requester's commercial interest."

Since Congress mandates that federal agencies "liberally" construe FOIA fee waiver requests by noncommercial entities such as Friends, *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1284 (9<sup>th</sup> Cir. 1987), more than enough information has been provided to satisfy this prong of the FOIA fee waiver standard.

**Requirement No. 2: Disclosure of the Information That Friends Requests Is Likely to Contribute to Public Understanding of the Operations and Activities of the Government**

The second prong of the FOIA statutory fee waiver provision requires that "disclosure of the information" be "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

The records to be disclosed will contribute significantly to public



August 22, 2012

understanding of governmental activity – the promulgation of a regulation designating critical habitat under the Endangered Species Act and relate to the listing of the western snowy plover, or the recovery plans for this species. 5 U.S.C. § 552(a)(4)(A)(iii). According to the U.S. Fish and Wildlife website, Mr. Frazer's duties include carrying out "policy development and management of all aspects of the Endangered Species program." <http://www.fws.gov/offices/gfrazer.htm>. Therefore, the information requested clearly concerns the operations or activities of the federal government, i.e., how the program has been implemented since 2008 as it relates to the plover.

As described further below, Friends has retained specialized legal counsel to read, digest, analyze, summarize and comment on the records underlying the FWS rule designating revised critical habitat for the snowy plover. The comments/digest of key documents will be posted on Friends' website and an email alert will be sent to its membership. This will alert a large segment of the interested public to the rule-making and issues regarding the rule-making.

Based on the standards of FOIA as interpreted by the Courts, this request undoubtedly will contribute significantly to public understanding of this rule-making:

First, the Ninth Circuit is particularly inclined to grant fee waivers for nonprofit entities digesting and disseminating information regarding the administrative record in a rule-making. *Friends of the Coast Fork*, supra, 110 F.3d at 55. Here, Friends has retained specialized legal counsel to obtain the documents (Tom Roth). His expertise includes the ESA and critical habitat designations. He has represented non-profit and other clients regarding previous iterations of the plover critical habitat rule. He is familiar with not only with the legal issues but also with the biological and scientific arguments and opinions previously expressed on all sides of the rule-making. He has previously on numerous occasions digested, summarized and analyzed administrative record documents underlying the plover critical habitat designation. He will engage in that exercise again here with respect to the requested FOIA records, and his client, Friends, will post the digest or comments on its website. Friends website has been operational since 2001, and is accessible both to its 28,000 members and the public at large. Friends retained the services of specialized legal counsel to review, digest and comment on the rule-making to ensure that the rule is promulgated in a fair and balanced manner that does not unfairly impact the users of Oceano Dunes SVRA.<sup>1</sup>

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<sup>1</sup> Also, as an attorney who has represented numerous clients in administrative matters and litigation on agency rule-makings related to the plover and having obtained a voluntary remand, as well as numerous economic exclusions related to plover critical habitat designations, Tom Roth is qualified to understand, analyze and digest the information contained in the requested public records in a manner to increase public awareness and the awareness of Friends' members and Oceano Dunes' users who are interested in the critical habitat designation for the western snowy plover.

August 22, 2012

Second, courts have held that the disclosure of governmental information that has not been previously released is likely to benefit the public. *D.C. Technical Assistance Organization, Inc. v. U.S. Department of Housing and Urban Development*, 85 F. Supp. 2d 46, 49 (D. D.C. 2000). Here, Friends believes that most of the records sought are records that predominantly have not been previously disclosed to the public. That, in turn, means that the disclosure of this new information "is likely to contribute significantly to public understanding of the operations or activities of the government."

Third, the requested disclosure will contribute to the public understanding of the plover critical habitat designation because Oceano Dunes SVRA users typically do not have the time or ability to ferret out the agency's activities that ultimately end up directly affecting their recreational interests. Dissemination of this information to Oceano Dunes users and Friends' members benefits this large group by educating them about this governmental action so that Friends or individual users may object, protest or file litigation against the FWS to challenge the rule if necessary. Protesting, objecting and litigating are legitimate actions of public watchdog organizations. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975). Without access to the requested records, Friends, its members, users of Oceano Dunes SVRA and the public would have no way to meaningfully evaluate the underlying reasoning (or absence of such reasoning) of the rule-making.

Fourth, as noted by the court in *D.C. Technical Assistance*, supra, 85 F. Supp. 2d at 49, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement" by disseminating information to the public through mechanisms such as the internet or broadcast email. Friends intends to disseminate its counsel's digest, summary or comments on the information to its members and users of Oceano Dunes SVRA, principally through its website (<http://www.oceanodunes.org/>) and through email alerts. Friends' website is accessible to the public throughout California and nationwide. In this day and age, most people access information via the web. It is more convenient and less expensive for those disseminating the information. It is also more convenient and less expensive for the public seeking the information. It is the typical and preferred means of the dissemination of information. Courts have found that dissemination through a website meets this prong of the fee waiver requirements. See *Fitzgibbon v. AID*, 724 F. Supp. 1048, 1051 (D. D.C. 1989).

Friends also will enhance dissemination of the information through email alerts to its members. Its members, combined with an e-mail list of known users of Oceano Dunes SVRA, totals some 28,000 people. This constitutes a reasonably large section of the public interested in the subject matter of the regulation. As the Second Circuit has stated, 'information need not actually reach a broad cross-section of the public in order to benefit the public at large . . . . The relevant inquiry . . . is whether the requestor will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.' " *D.C. Technical Assistance Organization, Inc.*, supra, 85 F. Supp. 2d 46, citing and quoting *Carney v. United States Dep't of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994), cert. den., 513 U.S. 823 (1994) ["As we understand the DOJ's position, no fee waiver would be granted to one unable to shoulder the formidable burden of demonstrating that

August 22, 2012

any records released actually will be disseminated to a large cross-section of the public. This position is not realistic. Information need not actually reach a broad cross-section of the public in order to benefit the public at large.”]; see also *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040-1041 (D. Idaho 2004); *Community Legal Services, Inc.*, supra, 405 F. Supp. 2d 553 [while information was unlikely to reach a very general audience, there was nevertheless a segment of the public interested in its work, i.e., a reasonably large segment of Philadelphia's low- and moderate-income families]. Through this dissemination, Friends has made its prima facie showing that disclosure to the public or a reasonably broad audience will be made.

Fifth, the agency should consider a FOIA requestor's track record and reputation for disseminating information to the public. *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994). Friends sought and was provided FOIA documents related to the 2005 ruling. Friends used the FOIA documents disclosed to it to provide numerous comments on the rule making that were of a quality to be published in the Federal Register and the FWS responded to these well-informed comments submitted by Friends. Thus, Friends used information obtained from a previous FOIA on an earlier critical habitat rule in 2005 to prepare detailed comments that FWS then summarized and made available to the public as part of the rule-making and preamble discussion in the 2005 rule. Friends has an important role of watchdog organization for our democracy by working on behalf of the public to protect and monitor public recreational parks and government activities affecting the parks. It is undeniable that distribution of the requested information to up to 28,000 members of an organization whose members use and support public recreational parks would be interested in the records relating to critical habitat of the western snowy plover that might impact those recreational opportunities constitutes "a reasonably broad audience of persons interested in the subject."

For these reasons, Friends qualifies for a fee waiver under FOIA.

**Without Waiving Its Objections to the DOI Fee Waiver Criteria, Friends Responds to Those Criteria As Follows:**

*(1) How do the records concern the operations or activities of the Government?*

See response provided above.

*(2) If the records concern the operations or activities of the Government, how will disclosure likely contribute to public understanding of these operations and activities?*

See response provided above.

*(i) How are the contents of the records you are seeking meaningfully informative on the*



August 22, 2012

*Department's or a bureau's operations and activities? Is there a logical connection between the content of the records and the operations or activities you are interested in?*

Communications to and from the head of the Endangered Species program are perhaps some of the most meaningful documents related to the agency's regulation of the plover under the ESA. The records of the FWS Assistant Director for Endangered Species regarding the western snowy plover logically reflect the government's rule-making and other contemplated actions and considerations regarding the plover.

*(ii) Other than enhancing your knowledge, how will disclosure of the requested records contribute to the understanding of the public at large or a reasonably broad audience of persons interested in the subject?*

See response provided above.

*(iii) Your identity, vocation, qualifications, and expertise regarding the requested information (whether you are affiliated with a newspaper, college or university, have previously published articles, books, etc.) may be relevant factors. However, merely stating that you are going to write a book, research a particular subject, or perform doctoral dissertation work, is insufficient, without demonstrating how you plan to disclose the information in a manner which will be informative to a reasonably broad audience of persons interested in the subject.*

See response provided above.

*(iv) Do you have the ability and intention to disseminate the information to the general public or a reasonably broad audience of persons interested in the subject?*

See response provided above.

*(A) How and to whom do you intend to disseminate the information?*

See response provided above.

*(B) How do you plan to use the information to contribute to public understanding of the Government's operations or activities?*

See response provided above.

*(3) If there is likely to be a contribution to public understanding, will release of the requested records contribute significantly to public understanding?*

See response provided above.

August 22, 2012

*(i) Is the information being disclosed new?*

Yes, see response provided above.

*(ii) Does the information being disclosed confirm or clarify data which has been released previously?*

Yes, it shows what direction the head of the endangered species program may have given regarding the regulation of the plover.

*(iii) How will disclosure increase the level of public understanding of the operations or activities of the Department or a bureau that existed prior to disclosure?*

Isn't this the same question asked with different words? See response provided above.

*(iv) Is the information already publicly available? If the Government previously has published the information you are seeking or it is routinely available to the public in a library, reading room, through the Internet, or as part of the administrative record for a particular issue ( e.g., the listing of the spotted owl as an endangered species), it is less likely that there will be a significant contribution from release.*

Friends is not aware of the release of anything more than a couple of emails to or from the head of the Endangered Species program to date. This information is not in any reading room.

*(4) Would disclosure be primarily in your commercial interest?*

No, see response provided above.

*(i) Do you have a commercial interest that would be furthered by disclosure? A commercial interest is a commercial, trade, or profit interest as these terms are commonly understood. Your status as "profitmaking" or "non-profitmaking" is not the deciding factor. Not only profitmaking entities, but other organizations or individuals may have a commercial interest to be served by disclosure, depending on the circumstances involved.*

None. See response provided above.

*(ii) If you do have a commercial interest that would be furthered by disclosure, would disclosure be primarily in that interest? Would the public interest in disclosure be greater than any commercial interest you or your organization may have in the documents? If so, how would it be greater?*

No commercial interest. See response provided above.



August 22, 2012

*(iii) Your identity, vocation, and the circumstances surrounding your request are all factors to be considered in determining whether disclosure would be primarily in your commercial interest. For example:*

*(A) If you are a representative of a news media organization seeking information as part of the news gathering process, we will presume that the public interest outweighs your commercial interest.*

Not applicable.

*(B) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.*

There is no basis for such a presumption in the FOIA fee waiver provision and it violates Congress' directive to liberally construe FOIA fee waiver applications for nonprofit watchdog organizations like Friends. Without waiving this objection, Friends responds that it has demonstrated that its interests are noncommercial recreational interests as described in detail above. A U.S. District Court has specifically ruled in Friends' favor on this point on a related FOIA request.

Thank you in advance for your attention to this matter.

Sincerely,

/s/

Tom Roth

Ex. A

**ARTICLES OF INCORPORATION  
OF  
FRIENDS OF OCEANO DUNES**

2314429  
**FILED**  
In the Office of the Secretary of State  
of the State of California  
JUN 12 2001  
*Bill Jones*  
BILL JONES, Secretary of State

ONE: The name of this corporation shall be:

**FRIENDS OF OCEANO DUNES**

TWO: This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law exclusively for charitable purposes. The corporation is formed for the express purpose of preserving and developing recreational uses in the Oceano Dunes areas of San Luis Obispo County, California. Such purposes for which this corporation is formed are exclusively charitable within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986.

Notwithstanding any other provisions of these articles, the corporation shall not carry on any activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

THREE: The name and address in California of this corporation's initial agent for service of process are:

EDWARD H. WALDHEIM  
3550 Foothill Boulevard  
Glendale, CA 91214

FOUR:

(a) No substantial part of the activities of this corporation shall consist of lobbying or propaganda, or otherwise attempting to influence legislation, except as provided in Section 501(h) of the Internal Revenue Code of 1986, and this corporation shall not participate in or intervene in (including publishing or distributing statements) any political campaign on behalf of or in opposition to any candidate for public office.

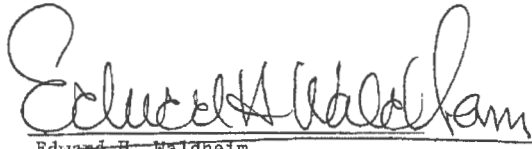
(b) All corporate property is irrevocably dedicated to the purposes set forth in Article Two, above. No part of the net earnings of this corporation shall inure to the benefit of any of its directors, trustees, officers or members, or to individuals.

(c) Upon the winding up or dissolution of the corporation, after paying or adequately providing for the debts and obligations of this corporation, the remaining assets shall be distributed to a non-profit fund, foundation, or corporation which is organized and operated exclusively for charitable and religious purposes and which has established its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and Section 23701(d) of the Revenue and Taxation Code. If this corporation holds any assets in trust, such assets will be disposed of in such a manner as may be directed by decree of the Superior Court of the county in which this

corporation's principal office is located, upon petition therefor by the Attorney General or by any person concerned in the liquidation.

FIVE: Subject to the limitations imposed by Corporations Code Section 5238, the Corporation shall, and does hereby, indemnify and hold each of its directors and officers free and harmless from and on account of all matters provided in Corporations Code Sections 5238 (b) and (c).

Dated: May 11, 2001

  
Edward H. Waldheim  
Incorporator





I hereby certify that the foregoing  
transcript of 3 page(s)  
is a full, true and correct copy of the  
original record in the custody of the  
California Secretary of State's office.

JAN 04 2012 *my*

Date: \_\_\_\_\_

*Debra Bowen*  
DEBRA BOWEN, Secretary of State

Ex. 2 to Complaint

1 THOMAS D. ROTH  
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2 One Market, Spear Tower, Suite 3600  
San Francisco, California 94105  
3 Telephone: (415) 293-7684  
4 Facsimile: (415) 435-2086  
Rothlaw1@comcast.net  
5 Attorneys for Friends of Oceano Dunes  
6

7  
8 ADMINISTRATIVE APPEAL  
9

10 FRIENDS OF OCEANO DUNES, a California )  
not-for-profit corporation, )

) **FREEDOM OF INFORMATION**  
) **APPEAL**

11  
12 v. )

13 U.S. FISH AND WILDLIFE SERVICE )

) **ADMINISTRATIVE APPEAL OF**  
) **FRIENDS OF OCEANO DUNES**  
) **IMPROPER WITHHOLDING OF**  
) **FOIA DOCUMENTS BY THE U.S.**  
) **FISH AND WILDLIFE SERVICE**

) Freedom of Information Act  
) Appeals Officer

17 ) FWS-2012-01232

18 ) FOIA Appeals Office  
) Department of the Interior  
) Office of the Solicitor  
) 1849 C Street, N.W.  
20 ) MS-6556 MIB  
21 ) Washington, DC 20240

22 ) Date submitted by email:  
23 ) October 19, 2012

24  
25 The Friends of Oceano Dunes (Friends), a California not-for-profit corporation,  
26 hereby appeals administratively the U.S. Fish and Wildlife's (FWS) improper withholding  
27 of documents and the failure to issue a determination on Friends' request for a fee waiver.  
28

1 The FWS has failed to timely produce all documents required by a Freedom of  
2 Information Act (FOIA) request concerning documents submitted to or authored by Gary  
3 D. Frazer, FWS Assistant Director for Endangered Species, during a specified time period  
4 and concerning the western snowy plover. It is now past the statutory time period and the  
5 FWS has failed to produce any documents or provide the determinations required by law.  
6

### 7 I. Facts and Overview

8 Pursuant to a letter dated and e-mailed to the FWS on August 22, 2012, the  
9 undersigned attorney (Roth) submitted a Freedom of Information Act (FOIA) request to the  
10 U.S. Fish and Wildlife Service (FWS) on behalf of the Friends of Oceano Dunes, Inc.  
11 (Friends), a California not-for-profit corporation. Exhibit 1 (Articles of Incorporation of  
12 Friends of Oceano Dunes, filed June 12, 2001); Exhibit 2 (Letter dated August 22, 2012, from  
13 Thomas D. Roth and emailed to FWS FOIA officers Johnny Hunt, Ray McLaughlin and  
14 Larry Buklis and to Ray McInerney and Clarice Julka of the Department of Interior.)

15 The FOIA request asked for information relating to the western snowy plover  
16 (plover) during a specified time period:

17 "(1) All documents, including emails, memos, notes or letters, to or from Gary D.  
18 Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service ("FWS") Assistant  
19 Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1,  
20 2008 to the date of this FOIA request."

21 Friends also requested a fee waiver. FOIA mandates a fee waiver "shall be  
22 furnished" when, as here, "disclosure of the information is in the public interest because it  
23 is likely to contribute significantly to public understanding of the operations or activities of  
24 the government and is not primarily in the commercial interest of the requester." [5 U.S.C. §  
25 552(a)(4)(A)(iii)] Roth set forth in pages 2-11 of Exhibit 2 (Letter dated August 22, 2012,  
26 from Thomas D. Roth and emailed to FWS FOIA officers Johnny Hunt, Ray McLaughlin  
27 and Larry Buklis and to Ray McInerney and Clarice Julka of the Department of Interior) a  
28

1 very detailed presentation of the statutory law, case law, and regulations that make it clear  
2 that Friends is entitled to a fee waiver. We incorporate by reference the fee waiver  
3 argument presented in Exhibit 2 rather than repeat here.

4 Friends has previously been granted a fee waiver for related requests for FOIA  
5 documents. And, in 2011, Friends prevailed in the U.S. District Court against FWS when it  
6 improperly denied a fee waiver request.

7 However, the FWS has failed to make a determination about Friends' request for a  
8 fee waiver.

9 The Department of Interior (DOI) and the FWS both have acknowledged receipt of  
10 Friends' FOIA request on August 23, 2012. Clarice Julka, FOIA officer for the DOI,  
11 responded by letter dated August 23, 2012, stating that the DOI had "determined that U.S.  
12 Fish and Wildlife Service (FWS) would likely have the records you are seeking." [Exhibit 3  
13 (Letter dated August 23, 2012 from DOI Clarice Julka, Office of the Secretary, FOIA Officer  
14 to Thomas D. Roth)]

15 On August 23, 2012, FWS FOIA officer Ray McLaughlin, acknowledged by e-mail  
16 the receipt of Roth's FOIA request, and assigned the tracking number for this request: FWS-  
17 2012-01232. Mr. McLaughlin also stated that our FOIA request "will be forwarded to the  
18 appropriate program or office for direct response to you." [Exhibit 4 (Email from Ray  
19 McLaughlin, FWS FOIA Officer, to Thomas Roth, dated August 23, 2012)]

20 Roth emailed Mr. McLaughlin on October 2, 2012 to inform him that he had "not  
21 received *any response* from Fish and Wildlife to this request." (Emphasis added) [Exhibit 5  
22 (Email from Thomas D. Roth dated October 2, 2012 to Ray McLaughlin)] The next day,  
23 October 3, 2012, FWS FOIA officer McLaughlin emailed FWS personnel Mary Klee, Helen  
24 Speights and Johnny Hunt on the issue of the status of the FOIA request, asking them to  
25 "send Mr. Roth the current status information for his request and let us know when you  
26 have responded." [Exhibit 6 (Email dated 10/3/12 from FWS FOIA Officer McLaughlin to  
27 FWS personnel: Mary Klee, Helen Speights and Johnny Hunt.)]  
28



1 On October 4, 2012, Mary Klee, FWS Biologist, emailed Thomas D. Roth to say, after  
2 all this time, the following:

3 "We have recently completed our search for documents responsive to your FOIA  
4 request referenced below. We are reviewing the responsive documents to determine if any  
5 of the information needs to be withheld" [Exhibit 6 (October 4, 2012 email from FWS  
6 Biologist Mary Klee to Thomas D. Roth.)]

7 In almost two months, the only substantive response by the FWS is two sentences to  
8 inform Friends that they have "responsive documents," but the FWS has not yet produced  
9 those documents as mandated by FOIA or rendered a determination on Friends' request for  
10 a fee waiver. The FWS has violated FOIA by failing to provide a determination and to  
11 produce the responsive documents within the FOIA time constraints.

12  
13  
14 **II. FWS's failure to make a timely production of the requested documents**  
15 **constitutes an improper withholding and inadequate document production in violation**  
16 **of FOIA. FWS has also failed to comply with FOIA's requirement to issue a**  
17 **determination about Friends' fee waiver request.**

18 The FWS is withholding requested responsive FOIA documents that must be  
19 produced immediately.

20 FOIA (5 USC § 552(a)(6)(A)(i)) clearly mandates that FWS "*shall determine within 20*  
21 *days... after the receipt of any such request whether to comply* with such request and shall  
22 immediately notify the person making such request of such determination and the reasons  
23 therefore..." (Italic emphasis added) The review and determination must be completed  
24 within those 20 days, which has been exceeded in this case. The DOI and FWS both  
25 acknowledge receipt of Friends' FOIA request on August 23<sup>rd</sup> but have not produced any of  
26 the responsive documents yet and it is now the later part of October. As stated by the  
27 courts: "FOIA requires the agency to determine within 20 days whether to comply with the  
28

1 request and provide certain notifications to the requester." *Oregon Natural Desert Ass'n v.*  
2 *Gutierrez*, 409 F.Supp.2d 1237 (D. Or. 2006). FOIA requires the federal agency's  
3 determination response to include at least four elements, and the federal agency has the  
4 burden to establish "compliance with the FOIA time limitations and determination  
5 requirements:"

6  
7 "A "determination" response sent to a person requesting information under the  
8 FOIA must include at least four elements: (1) a statement of what the agency will release  
9 and will not release, including a list of the documents that are releasable and withheld; (2)  
10 a statement of the reasons for not releasing the withheld records; (3) a statement notifying  
11 the requesting person of his right to appeal to the head of the agency or seek judicial  
12 review of any adverse determination; and (4) if a fee is charged for releasing documents, a  
13 statement of why the agency believes that waiver or reduction of the fee is not in the public  
14 interest and does not benefit the general public, and a statement for the charges for  
15 document search and duplication of the releasable documents. *Shermco Industries v.*  
16 *Secretary of the U.S. Air Force*, 452 F.Supp. 306, 317 (N.D. Tex.1978), reversed on other  
17 grounds 613 F.2d 1314 (5th Cir.1980). See also 10 C.F.R. 1004.7(b) (DOE requirements of  
18 form and substance of a denial of FOIA request)." *Virginia Transformer Corp. v. U.S. Dept. of*  
19 *Energy*, 628 F.Supp. 944 (W.D. Va. 1986); *See also, Oglesby v. U.S. Dept. of Army*, 920 F.2d 57  
20 (9<sup>th</sup> Cir. 1990) ("A response is sufficient for purposes of requiring an administrative appeal  
21 if it includes: the agency's determination of whether or not to comply with the request; the  
22 reasons for its decision; and notice of the right of the requester to appeal to the head of the  
23 agency if the initial agency decision is adverse. 5 U.S.C. § 552(a)(6)(A)(i); see *Shermco*  
24 *Industries v. Secretary of the United States Air Force*, 452 F.Supp. 306 (N.D.Tex.1978), rev'd on  
25 other grounds, 613 F.2d 1314 (5th Cir.1980). Assuming an agency's initial response  
26 complies with these requirements, the FOIA requester must appeal to the head of the  
27 agency.") The FWS has not issued a determination on Friends' request for a fee waiver.  
28

1 Under FOIA, "Congress rejected the traditional rule of deference to administrative  
2 determinations by "[p]lacing the burden of proof upon the agency" to justify the  
3 withholding" of documents by stating a reason for withholding documents. *EPA v. Mink*,  
4 410 U.S. 73 (1973). This "strong presumption in favor of disclosure places the burden on  
5 the agency to justify the withholding of any requested documents." *U.S. Dept. of State v.*  
6 *Ray*, 502 U.S. 164, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991). FOIA expressly limits the  
7 grounds that FWS may use to withhold documents. FWS's refusal to provide these records  
8 for any reason other than one of the enumerated statutory exemptions constitutes  
9 withholding and also violates the determination requirements. See, e.g., *U.S. Department*  
10 *of Justice v. Tax Analysts*, 492 U.S. 136 (1989) ("Congress used the word "withheld" only "in  
11 its usual sense." *Kissinger*, 445 U.S., at 151. When the Department refused to grant Tax  
12 Analysts' requests for the district court decisions in its files, it undoubtedly "withheld"  
13 these decisions in any reasonable sense of that term. Nothing in the history or purposes of  
14 the FOIA counsels contorting this word beyond its usual meaning..... *An agency must*  
15 *disclose agency records to any person under § 552(a), "unless they may be withheld pursuant to one*  
16 *of the nine enumerated exemptions listed in § 552(b)."*) (Emphasis added).

17 As stated by the Ninth Circuit:

18 "Unless documents fall within one of the nine specific exemptions to the disclosure  
19 requirement of the FOIA, they are presumed to be available for public inspection. See 5  
20 U.S.C. § 552(c) ("This section does not authorize withholding of information or limit the  
21 availability of records to the public, *except as specifically stated in this section.*") (emphasis  
22 added)." *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9<sup>th</sup> Cir. 1988).

23 When a federal agency fails to make a "timely determination" or response, it  
24 constitutes an "improper withholding" in "violation of FOIA," even if documents are "later  
25 correctly determined not to be subject to disclosure." *Oregon Natural Desert Ass'n v.*  
26 *Gutierrez*, 409 F.Supp.2d 1237 (D. Or. 2006). The U.S. Supreme Court has noted that  
27 inadequate responses may constitute an improper withholding: "Even when an agency  
28 does not deny a FOIA request outright, the requesting party may still be able to claim

1 "improper" withholding by alleging that the agency has responded in an inadequate  
2 manner." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, n.12 (1989).

3 Congressional legislative history makes it clear that delay can be tantamount to a denial  
4 because information often is useful only when it is timely:

5 "The legislative history of the FOIA also supports this view. Congress has repeatedly  
6 stressed the need for timely compliance with the requirements of the FOIA. When the ten-  
7 day time limit for responding to FOIA requests was added to the FOIA in 1974, Congress  
8 noted that it was doing so "in order to contribute to the fuller and faster release of  
9 information, which is the basic objective of the Act." H.Rep. No. 876, 93d Cong., 2d Sess.,  
10 reprinted in 1974 U.S.Code Cong. & Admin.News 6267, 6267.

11 [I]nformation is often useful only if it is timely. Thus, excessive delay by the  
12 agency in its response is often tantamount to denial. It is the intent of this bill  
13 that the affected agencies be required to respond to inquiries and administrative  
14 appeals within specific time limits. *Id.* at 6271." *Gilmore v. U.S. Dep't of Energy*, 33  
15 F.Supp.2d 1184 (N.D. Cal. 1998).

16 FOIA 5 USC § 552(a)(6)(C) further states that an administrative appeal may be taken  
17 when an agency fails to issue a determination within the statutory 20-day deadline:

18  
19 "(C)

20 (i) Any person making a request to any agency for records under paragraph (1), (2),  
21 or (3) of this subsection shall be deemed to have exhausted his administrative remedies  
22 with respect to such request if the agency fails to comply with the applicable time limit  
23 provisions of this paragraph. If the Government can show exceptional circumstances exist  
24 and that the agency is exercising due diligence in responding to the request, the court may  
25 retain jurisdiction and allow the agency additional time to complete its review of the  
26 records. *Upon any determination by an agency to comply with a request for records, the records*  
27 *shall be made promptly available to such person making such request.* Any notification of denial  
28 of any request for records under this subsection shall set forth the names and titles or

1 positions of each person responsible for the denial of such request." (Emphasis Added)

2 The FWS sent a few emails and letters to Roth, but none of those communications  
3 alone or in the aggregate constituted a "determination" within the meaning of FOIA, and  
4 none of the responsive documents found by FWS have been produced to Friends.

5 The FWS also has failed to make a determination on Friends' fee waiver request. To  
6 the extent that FWS' lack of response on the fee waiver is a denial (which has not been  
7 made clear by the agency), Friends incorporates by this reference the entirety of its fee  
8 waiver application and the arguments therein (attached hereto).

9 There is no doubt that Friends is entitled under the law to an immediate and  
10 adequate responsive production of the documents withheld, and to a determination by  
11 FWS on Friends' request for a fee waiver.

12  
13 DATED: October 19, 2012

14 LAW OFFICES OF THOMAS D. ROTH

15  
16 By:

17       /s/        
18 THOMAS D. ROTH

19 Attorney for Friends of Oceano Dunes  
20  
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22  
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28





ARTICLES OF INCORPORATION  
OF  
FRIENDS OF OCEANO DUNES

2314429  
**FILED**  
In the Office of the Secretary of State  
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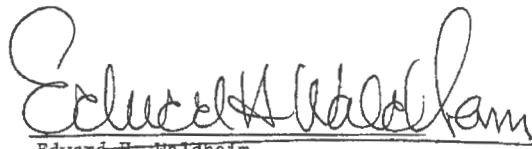
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Dated: May 11, 2001

  
Edward H. Waldheim  
Incorporator



I hereby certify that the foregoing  
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is a full, true and correct copy of the  
original record in the custody of the  
California Secretary of State's office.

JAN 04 2012 *my*

Date: \_\_\_\_\_

*Debra Bowen*

DEBRA BOWEN, Secretary of State





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August 22, 2012

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**By E-mail:** [r9foia@fws.gov](mailto:r9foia@fws.gov)

Johnny Hunt/Ray McLaughlin, FWS FOIA Officers  
U.S. Fish & Wildlife Service  
Div. of Info. Resources & Tech. Management  
Arlington Square  
MS-380  
4401 N. Fairfax Drive  
Arlington, VA 22203  
(703) 358-2504 (Telephone)  
(703) 358-2251 (Fax)

**By E-Mail:** [Larry\\_Buklis@fws.gov](mailto:Larry_Buklis@fws.gov)

Larry Buklis, FOIA Coordinator (Region 1/8)  
Fish and Wildlife Service  
911 NE 11th Ave  
Portland, OR 97232  
503-231-2072 (Telephone)  
503-231-6259 (Fax)

**Re: Freedom of Information Act (FOIA) Request**

Dear FOIA Officers and Coordinators:

This firm represents the Friends of Oceano Dunes ("Friends"), a California not-for-profit corporation, representing approximately 28,000 members and users

August 22, 2012

of the Oceano Dunes State Vehicular Recreation Area ("SVRA") located near Pismo Beach, California.

The critical habitat designation for the western snowy plover may impact recreational opportunities for Friends' 28,000 members and users of the Oceano Dunes SVRA. Friends is a public watchdog organization that has been monitoring the rule-makings that might affect this state park since 2001.

### **FOIA Request**

Pursuant to the Freedom of Information Act ("FOIA") and Department of Interior ("DOI") regulations, Friends hereby requests copies of the following documents:

(1) All documents, including emails, memos, notes or letters, to or from Gary D. Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service ("FWS") Assistant Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1, 2008 to the date of this FOIA request.

### **Fee Category**

The fee category for Friends is "other requesters." 43 C.F.R. Part 2 § 2.17 (a)(4).

### **Request to Begin Processing Immediately**

Friends is seeking a fee waiver for this request (see below). However, pursuant to DOI regulations, Friends is willing to pay regardless of whether a fee waiver is ultimately granted. According to the regulations, "this will permit the bureau to process your request for records at the same time it is considering the fee waiver request. If you are required to pay a fee, and it is later determined on appeal that you are entitled to a full or partial fee waiver, an appropriate refund will be made." 43 C.F.R. Part 2 § 2.8 (b)(2). Therefore, please commence processing of this request immediately.

### **Friends Requests A Fee Waiver**

FOIA mandates a fee waiver "shall be furnished" when, as here, "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." [5 U.S.C. § 552(a)(4)(A)(iii)]

Friends previously has been granted a fee waiver for related requests for FOIA documents underlying the FWS's 2005 and 2012 plover critical habitat rule-makings. In 2011, Friends also prevailed in U.S. District Court against FWS for its improper denial of a fee waiver request.

Here, Friends meets the two-prong fee waiver test, as well as the DOI fee waiver guidelines in 43 C.F.R Appendix D to Part 2:

August 22, 2012

### **The Purpose of FOIA Is to Ensure the Right of Citizens to Be Informed About Governmental Actions and Operations.**

The purpose of FOIA "is to ensure an informed citizenry" which is "vital to the functioning of a democratic society" and to hold the government accountable. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Congress created a "judicially enforceable public right" to secure government documents. *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA protects citizens' "right to be informed about what their Government is up to," *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), and to ensure transparency in governmental activities. *Stern v. FBI*, 737 F.2d 84, 88 (D.C. Cir. 1984).

Congress implemented its intent by providing that a FOIA request may be made by "any person," 5 U.S.C. § 552(a)(3), a term that includes corporations such as *Friends. Judicial Watch of Fla., Inc. v. United States DOJ*, 102 F. Supp. 2d 6, 10 (D. D.C. 2000).

### **Congress Added the FOIA Fee Waiver Provision to Prevent Federal Agencies from Using Fees to Discourage Certain Types of Requesters and Requests.**

FOIA mandates that fees "shall" be waived or reduced in certain circumstances – specifically, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *Friends of the Coast Fork v. United States Dep't of Interior*, 110 F.3d 53, 54-55 (9th Cir. 1997).

The fee waiver provision was added in 1974 in "an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," particularly non-profit public interest groups. *Ettlinger v. Fed. Bureau of Investigation*, 596 F. Supp. 867, 872 (D. Mass. 1984) (citing Senate Comm. on the Judiciary, Amending FOIA, S. Rep. No. 93-854, at 10-19 (1974)). Because federal agencies continued to impose high fees as a tool to block certain requesters, Congress had to step in again in 1986. That year, Congress amended FOIA to ease the standards for non-commercial requesters to obtain a waiver. See 132 Cong. Rec. S14,298 (Sept. 30, 1986) (Sen. Leahy); see also *Judicial Watch*, 326 F.3d at 1315; *Institute for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1232 (D. Or. 2003) ("Congress intended . . . public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society."). According to Senator Leahy, one of the principal architects of the FOIA Amendment, the fee waiver amendment was necessary "to remove the roadblocks and technicalities . . . used by . . . Federal agencies to deny waivers . . . of fees under the FOIA." 132 Cong. Rec. S16,496 (Oct. 15, 1986) (Sen. Leahy); see, e.g., *Judicial Watch*, 326 F.3d at 1315; *Community Legal Servs. v. United States HUD*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 856 (D. Colo. 1994). Congress included the fee waiver provision in FOIA because it explicitly recognized the importance and the difficulty of access to governmental

August 22, 2012

documents for under-funded organizations and individuals. *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 94 (D.C. Cir. 1986).)

Thus, the fee waiver for non-commercial entities is a critical part of ensuring public disclosure of government activities. Federal agencies have a long and unfortunate history of using high fees to discourage FOIA requests, and Congress has amended the act previously to try to address federal agency resistance.

### **FOIA Establishes Only Two Requirements for a Fee Waiver**

Under FOIA, Congress mandates that requested records be “furnished without any charge” . . . “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Thus, FOIA only imposes two requirements for a fee waiver: (1) that the information sought “is not primarily in the commercial interest of the requester”; and (2) that the information sought is in the “public interest” because it is “likely to contribute significantly to the public understanding of the operations or activities of the government.” *Id.*

FWS has adopted regulations which purport to interpret FOIA by evaluating factors in determining whether an applicant is entitled to a fee waiver. 43 C.F.R. Appendix D, Part 2.

The DOI factors are largely duplicative and redundant of one another. To the extent that they add to or exceed the requirements established by FOIA itself, they are not valid. Courts are not bound by an agency’s interpretation of the FOIA fee waiver provision, especially to the extent that the interpretation conflicts with, or changes or adds to, the standard set by FOIA itself. *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (“we will not defer to an agency’s view of FOIA’s meaning. . .”).

As a general comment, the additional DOI standards are over-engineered, poorly drafted, add little or nothing meaningful to the analysis, and unduly burden the applicant.

### **Requirement No. 1: Friends’ FOIA Request Is Not Primarily in Its Commercial Interest**

Friends has no commercial interest that would be furthered by its FOIA request, or information obtained in that request.

Its FOIA request concerns communications to and from the head of the endangered species program so that Friends can understand more fully why FWS decided to re-impose critical habitat for the western snowy plover on areas that were previously excluded from the critical habitat designation.



August 22, 2012

Oceano Dunes SVRA was expressly established by the State of California as an area available to the public for off-road vehicle recreation, and is maintained by the California Department of Parks and Recreation specifically for that purpose. It is also one of the last areas on the California coast open to vehicles to drive on the beach.

Designating areas of Oceano Dunes SVRA as critical habitat has the potential either directly or indirectly to impede, limit or prevent off-road vehicle recreation. The designation is likely to be used by other state and local agencies that are hostile to off-road recreation at this location, or by purported environmental groups.

The area is heavily managed to protect plovers and critical habitat appears to add little or no additional protection while having a very large economic impact, and an impact on recreational uses that have been on-going for 100 years or more.

Friends of Oceano Dunes, Inc. is a California not-for-profit corporation established in 2001 "for the express purpose of preserving and developing recreational uses in the Oceano Dunes areas of San Luis Obispo County, California." (See Ex. A hereto.) Its members are individuals who use Oceano Dunes SVRA for off-road recreation, as the park was intended. No significant number of members has any commercial interest in the SVRA one way or another. They simply enjoy off-roading recreation at Oceano Dunes by themselves, or with friends and/or family.

Friends and its members are concerned about the western snowy plover rulemakings' impact on off road vehicle recreational opportunities. Friends' and its members' interest in the requested FOIA records is related simply to preserving their recreational activities and the public's recreational activities at Oceano Dunes SVRA. Friends has no commercial interest in the FOIA request whatsoever. As such, there is no argument that the request is "primarily in the requester's commercial interest."

Since Congress mandates that federal agencies "liberally" construe FOIA fee waiver requests by noncommercial entities such as Friends, *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1284 (9<sup>th</sup> Cir. 1987), more than enough information has been provided to satisfy this prong of the FOIA fee waiver standard.

#### **Requirement No. 2: Disclosure of the Information That Friends Requests Is Likely to Contribute to Public Understanding of the Operations and Activities of the Government**

The second prong of the FOIA statutory fee waiver provision requires that "disclosure of the information" be "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

The records to be disclosed will contribute significantly to public

August 22, 2012

understanding of governmental activity – the promulgation of a regulation designating critical habitat under the Endangered Species Act and relate to the listing of the western snowy plover, or the recovery plans for this species. 5 U.S.C. § 552(a)(4)(A)(iii). According to the U.S. Fish and Wildlife website, Mr. Frazer's duties include carrying out "policy development and management of all aspects of the Endangered Species program." <http://www.fws.gov/offices/gfrazer.htm>. Therefore, the information requested clearly concerns the operations or activities of the federal government, i.e., how the program has been implemented since 2008 as it relates to the plover.

As described further below, Friends has retained specialized legal counsel to read, digest, analyze, summarize and comment on the records underlying the FWS rule designating revised critical habitat for the snowy plover. The comments/digest of key documents will be posted on Friends' website and an email alert will be sent to its membership. This will alert a large segment of the interested public to the rule-making and issues regarding the rule-making.

Based on the standards of FOIA as interpreted by the Courts, this request undoubtedly will contribute significantly to public understanding of this rule-making:

First, the Ninth Circuit is particularly inclined to grant fee waivers for nonprofit entities digesting and disseminating information regarding the administrative record in a rule-making. *Friends of the Coast Fork*, supra, 110 F.3d at 55. Here, Friends has retained specialized legal counsel to obtain the documents (Tom Roth). His expertise includes the ESA and critical habitat designations. He has represented non-profit and other clients regarding previous iterations of the plover critical habitat rule. He is familiar with not only with the legal issues but also with the biological and scientific arguments and opinions previously expressed on all sides of the rule-making. He has previously on numerous occasions digested, summarized and analyzed administrative record documents underlying the plover critical habitat designation. He will engage in that exercise again here with respect to the requested FOIA records, and his client, Friends, will post the digest or comments on its website. Friends website has been operational since 2001, and is accessible both to its 28,000 members and the public at large. Friends retained the services of specialized legal counsel to review, digest and comment on the rule-making to ensure that the rule is promulgated in a fair and balanced manner that does not unfairly impact the users of Oceano Dunes SVRA.<sup>1</sup>

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<sup>1</sup> Also, as an attorney who has represented numerous clients in administrative matters and litigation on agency rule-makings related to the plover and having obtained a voluntary remand, as well as numerous economic exclusions related to plover critical habitat designations, Tom Roth is qualified to understand, analyze and digest the information contained in the requested public records in a manner to increase public awareness and the awareness of Friends' members and Oceano Dunes' users who are interested in the critical habitat designation for the western snowy plover.

August 22, 2012

Second, courts have held that the disclosure of governmental information that has not been previously released is likely to benefit the public. *D.C. Technical Assistance Organization, Inc. v. U.S. Department of Housing and Urban Development*, 85 F. Supp. 2d 46, 49 (D. D.C. 2000). Here, Friends believes that most of the records sought are records that predominantly have not been previously disclosed to the public. That, in turn, means that the disclosure of this new information "is likely to contribute significantly to public understanding of the operations or activities of the government."

Third, the requested disclosure will contribute to the public understanding of the plover critical habitat designation because Oceano Dunes SVRA users typically do not have the time or ability to ferret out the agency's activities that ultimately end up directly affecting their recreational interests. Dissemination of this information to Oceano Dunes users and Friends' members benefits this large group by educating them about this governmental action so that Friends or individual users may object, protest or file litigation against the FWS to challenge the rule if necessary. Protesting, objecting and litigating are legitimate actions of public watchdog organizations. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975). Without access to the requested records, Friends, its members, users of Oceano Dunes SVRA and the public would have no way to meaningfully evaluate the underlying reasoning (or absence of such reasoning) of the rule-making.

Fourth, as noted by the court in *D.C. Technical Assistance*, *supra*, 85 F. Supp. 2d at 49, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement" by disseminating information to the public through mechanisms such as the internet or broadcast email. Friends intends to disseminate its counsel's digest, summary or comments on the information to its members and users of Oceano Dunes SVRA, principally through its website (<http://www.oceanodunes.org/>) and through email alerts. Friends' website is accessible to the public throughout California and nationwide. In this day and age, most people access information via the web. It is more convenient and less expensive for those disseminating the information. It is also more convenient and less expensive for the public seeking the information. It is the typical and preferred means of the dissemination of information. Courts have found that dissemination through a website meets this prong of the fee waiver requirements. See *Fitzgibbon v. AID*, 724 F. Supp. 1048, 1051 (D. D.C. 1989).

Friends also will enhance dissemination of the information through email alerts to its members. Its members, combined with an e-mail list of known users of Oceano Dunes SVRA, totals some 28,000 people. This constitutes a reasonably large section of the public interested in the subject matter of the regulation. As the Second Circuit has stated, 'information need not actually reach a broad cross-section of the public in order to benefit the public at large . . . . The relevant inquiry . . . is whether the requestor will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.' " *D.C. Technical Assistance Organization, Inc.*, *supra*, 85 F. Supp. 2d 46, citing and quoting *Carney v. United States Dep't of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994), cert. den., 513 U.S. 823 (1994) ["As we understand the DOJ's position, no fee waiver would be granted to one unable to shoulder the formidable burden of demonstrating that



August 22, 2012

any records released actually will be disseminated to a large cross-section of the public. This position is not realistic. Information need not actually reach a broad cross-section of the public in order to benefit the public at large."]; see also *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040-1041 (D. Idaho 2004); *Community Legal Services, Inc.*, supra, 405 F. Supp. 2d 553 [while information was unlikely to reach a very general audience, there was nevertheless a segment of the public interested in its work, i.e., a reasonably large segment of Philadelphia's low- and moderate-income families]. Through this dissemination, Friends has made its prima facie showing that disclosure to the public or a reasonably broad audience will be made.

Fifth, the agency should consider a FOIA requestor's track record and reputation for disseminating information to the public. *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994). Friends sought and was provided FOIA documents related to the 2005 ruling. Friends used the FOIA documents disclosed to it to provide numerous comments on the rule making that were of a quality to be published in the Federal Register and the FWS responded to these well-informed comments submitted by Friends. Thus, Friends used information obtained from a previous FOIA on an earlier critical habitat rule in 2005 to prepare detailed comments that FWS then summarized and made available to the public as part of the rule-making and preamble discussion in the 2005 rule. Friends has an important role of watchdog organization for our democracy by working on behalf of the public to protect and monitor public recreational parks and government activities affecting the parks. It is undeniable that distribution of the requested information to up to 28,000 members of an organization whose members use and support public recreational parks would be interested in the records relating to critical habitat of the western snowy plover that might impact those recreational opportunities constitutes "a reasonably broad audience of persons interested in the subject."

For these reasons, Friends qualifies for a fee waiver under FOIA.

**Without Waiving Its Objections to the DOI Fee Waiver Criteria, Friends Responds to Those Criteria As Follows:**

(1) *How do the records concern the operations or activities of the Government?*

See response provided above.

(2) *If the records concern the operations or activities of the Government, how will disclosure likely contribute to public understanding of these operations and activities?*

See response provided above.

(i) *How are the contents of the records you are seeking meaningfully informative on the*

August 22, 2012

*Department's or a bureau's operations and activities? Is there a logical connection between the content of the records and the operations or activities you are interested in?*

Communications to and from the head of the Endangered Species program are perhaps some of the most meaningful documents related to the agency's regulation of the plover under the ESA. The records of the FWS Assistant Director for Endangered Species regarding the western snowy plover logically reflect the government's rule-making and other contemplated actions and considerations regarding the plover.

*(ii) Other than enhancing your knowledge, how will disclosure of the requested records contribute to the understanding of the public at large or a reasonably broad audience of persons interested in the subject?*

See response provided above.

*(iii) Your identity, vocation, qualifications, and expertise regarding the requested information (whether you are affiliated with a newspaper, college or university, have previously published articles, books, etc.) may be relevant factors. However, merely stating that you are going to write a book, research a particular subject, or perform doctoral dissertation work, is insufficient, without demonstrating how you plan to disclose the information in a manner which will be informative to a reasonably broad audience of persons interested in the subject.*

See response provided above.

*(iv) Do you have the ability and intention to disseminate the information to the general public or a reasonably broad audience of persons interested in the subject?*

See response provided above.

*(A) How and to whom do you intend to disseminate the information?*

See response provided above.

*(B) How do you plan to use the information to contribute to public understanding of the Government's operations or activities?*

See response provided above.

*(3) If there is likely to be a contribution to public understanding, will release of the requested records contribute significantly to public understanding?*

See response provided above.

August 22, 2012

*(i) Is the information being disclosed new?*

Yes, see response provided above.

*(ii) Does the information being disclosed confirm or clarify data which has been released previously?*

Yes, it shows what direction the head of the endangered species program may have given regarding the regulation of the plover.

*(iii) How will disclosure increase the level of public understanding of the operations or activities of the Department or a bureau that existed prior to disclosure?*

Isn't this the same question asked with different words? See response provided above.

*(iv) Is the information already publicly available? If the Government previously has published the information you are seeking or it is routinely available to the public in a library, reading room, through the Internet, or as part of the administrative record for a particular issue ( e.g., the listing of the spotted owl as an endangered species), it is less likely that there will be a significant contribution from release.*

Friends is not aware of the release of anything more than a couple of emails to or from the head of the Endangered Species program to date. This information is not in any reading room.

*(4) Would disclosure be primarily in your commercial interest?*

No, see response provided above.

*(i) Do you have a commercial interest that would be furthered by disclosure? A commercial interest is a commercial, trade, or profit interest as these terms are commonly understood. Your status as "profitmaking" or "non-profitmaking" is not the deciding factor. Not only profitmaking entities, but other organizations or individuals may have a commercial interest to be served by disclosure, depending on the circumstances involved.*

None. See response provided above.

*(ii) If you do have a commercial interest that would be furthered by disclosure, would disclosure be primarily in that interest? Would the public interest in disclosure be greater than any commercial interest you or your organization may have in the documents? If so, how would it be greater?*

No commercial interest. See response provided above.



August 22, 2012

*(iii) Your identity, vocation, and the circumstances surrounding your request are all factors to be considered in determining whether disclosure would be primarily in your commercial interest. For example:*

*(A) If you are a representative of a news media organization seeking information as part of the news gathering process, we will presume that the public interest outweighs your commercial interest.*

Not applicable.

*(B) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.*

There is no basis for such a presumption in the FOIA fee waiver provision and it violates Congress' directive to liberally construe FOIA fee waiver applications for nonprofit watchdog organizations like Friends. Without waiving this objection, Friends responds that it has demonstrated that its interests are noncommercial recreational interests as described in detail above. A U.S. District Court has specifically ruled in Friends' favor on this point on a related FOIA request.

Thank you in advance for your attention to this matter.

Sincerely,

/s/

Tom Roth

Ex. A

ARTICLES OF INCORPORATION  
OF  
FRIENDS OF OCEANO DUNES

2314429  
**FILED**  
In the Office of the Secretary of State  
of the State of California  
JUN 12 2001  
  
BILL JONES, Secretary of State

ONE: The name of this corporation shall be:

FRIENDS OF OCEANO DUNES

TWO: This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law exclusively for charitable purposes. The corporation is formed for the express purpose of preserving and developing recreational uses in the Oceano Dunes areas of San Luis Obispo County, California. Such purposes for which this corporation is formed are exclusively charitable within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986.

Notwithstanding any other provisions of these articles, the corporation shall not carry on any activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

THREE: The name and address in California of this corporation's initial agent for service of process are:

EDWARD H. WALDHEIM  
3550 Foothill Boulevard  
Glendale, CA 91214

FOUR:

(a) No substantial part of the activities of this corporation shall consist of lobbying or propaganda, or otherwise attempting to influence legislation, except as provided in Section 501(h) of the Internal Revenue Code of 1986, and this corporation shall not participate in or intervene in (including publishing or distributing statements) any political campaign on behalf of or in opposition to any candidate for public office.

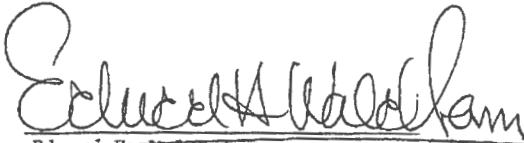
(b) All corporate property is irrevocably dedicated to the purposes set forth in Article Two, above. No part of the net earnings of this corporation shall inure to the benefit of any of its directors, trustees, officers or members, or to individuals.

(c) Upon the winding up or dissolution of the corporation, after paying or adequately providing for the debts and obligations of this corporation, the remaining assets shall be distributed to a non-profit fund, foundation, or corporation which is organized and operated exclusively for charitable and religious purposes and which has established its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and Section 23701(d) of the Revenue and Taxation Code. If this corporation holds any assets in trust, such assets will be disposed of in such a manner as may be directed by decree of the Superior Court of the county in which this

corporation's principal office is located, upon petition therefor by the Attorney General or by any person concerned in the liquidation.

FIVE: Subject to the limitations imposed by Corporations Code Section 5238, the Corporation shall, and does hereby, indemnify and hold each of its directors and officers free and harmless from and on account of all matters provided in Corporations Code Sections 5238 (b) and (c).

Dated: May 11, 2001

  
Edward H. Waldheim  
Incorporator



I hereby certify that the foregoing  
transcript of 3 page(s)  
is a full, true and correct copy of the  
original record in the custody of the  
California Secretary of State's office.

JAN 04 2012 *my*

Date: \_\_\_\_\_

*Debra Bowen*  
DEBRA BOWEN, Secretary of State



Ex. 3



## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

IN REPLY REFER TO:  
7202.4-OS-2012-00452

August 23, 2012

Thomas Roth  
Law Offices of Thomas D. Roth  
One Market, Spear Tower, Ste. 3600  
San Francisco, CA 94105

Dear Mr. Roth:

On August 22, 2012, you sent two Freedom of Information Act (FOIA) requests seeking the following:

- (1) All documents, including emails, memos, notes or letters, to or from Gary D. Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service ("FWS") Assistant Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1, 2008 to the date of this FOIA request.

Your requests were received in the Office of the Secretary FOIA office on August 23, 2012, and assigned control number **OS-2012-00452**. Please cite this number in any future communications with our office regarding your request.

Given the subject matter of your request, we have determined that U.S. Fish and Wildlife Service (FWS) would likely have the records you are seeking. We understand that the U.S. Fish and Wildlife Service (FWS) will be responding separately to your request.

This concludes the Office of the Secretary's response to your request.

If you have any questions about our processing of this request, you may contact Cindy Sweeney by phone at 202-208-3552, by fax at 202-219-2374, by email at [os\\_foia@ios.doi.gov](mailto:os_foia@ios.doi.gov), or by mail at U.S. Department of the Interior, 1951 Constitution Ave, N.W., MS 116 SIB, Washington, D.C. 20240.

Sincerely,

Clarice Julka  
Office of the Secretary  
FOIA Officer



----- Forwarded Message

**From:** <R9FOIA@fws.gov>

**Date:** Thu, 23 Aug 2012 14:01:18 -0400

**To:** Tom Roth <rothlaw1@comcast.net>

**Cc:** <Johnny\_Hunt@fws.gov>

**Subject:** Re: FOIA and Fee Waiver Request

Dear Mr. Roth,

This is acknowledgement of receipt of your FOIA request dated August 22, 2012, for all documents, including emails, memos, notes or letters, to or from Gary D. Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service Assistant Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1, 2008 to the date of this FOIA request. Your request has been assigned the following tracking number: FWS-2012-01232. Please refer to the tracking number in all correspondence. Your requests will be forwarded to the appropriate program or office for direct response to you. If you have any questions, please contact us. Thank you.

E. Ray McLaughlin, Alternate FOIA Officer  
U.S. Fish and Wildlife Service  
Division of Information Resources & Technology Mgmt.  
4401 N. Fairfax Drive, Mailstop Rm 380  
Arlington, Virginia 22203



cc

Johnny Hunt/ARL/R9/FWS/DOI@FWS

Subject

Fw: FOIA Request  
Mary and Helen,

Please see email below from Tom Roth requesting the status of his request. Request was sent to ES on 08-27-12. Please send Mr. Roth the current status information for his request and let us know when you have responded. Thanks.

E. Ray McLaughlin, Alternate FOIA Officer  
U.S. Fish and Wildlife Service  
Division of Information Resources & Technology Mgmt.  
4401 N. Fairfax Drive, Mailstop Rm 380  
Arlington, VA 22203  
Email: Ernest\_McLaughlin@fws.gov  
Tel: 703-358-2698 Fax 703-358-2251

----- Forwarded by Ernest McLaughlin/ARL/R9/FWS/DOI on 10/03/2012 11:00 AM -----

**Tom Roth <rothlaw1@comcast.net> 10/02/2012 05:03 PM**

To

<R9FOIA@fws.gov>

cc

Subject

Re: FOIA and Fee Waiver Request

I have not received any response from Fish and Wildlife to this request.

Tom Roth  
Law Offices of Thomas D. Roth  
One Market, Spear Tower, Suite 3600  
San Francisco, CA 94105  
415 293-7684  
415 435-2086 (Fax)



----- Forwarded Message

**From:** <Mary\_Klee@fws.gov>

**Date:** Thu, 4 Oct 2012 13:50:34 -0400

**To:** Tom Roth <rothlaw1@comcast.net>

**Cc:** <Ernest\_McLaughlin@fws.gov>, <Johnny\_Hunt@fws.gov>, <Helen\_Speights@fws.gov>

**Subject:** Fw: FOIA Request - western snowy plover

Dear Mr. Roth,

We have recently completed our search for documents responsive to your FOIA request referenced below. We are reviewing the responsive documents to determine if any of the information needs to be withheld

---

Mary Klee, Biologist  
U.S. Fish & Wildlife Service  
Endangered Species Program  
Office of ESA Litigation, room 436-b  
ph. (703) 358-2421 fax (703) 358-1735  
e-mail Mary\_Klee@fws.gov

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Fri, Oct 19, 2012 12:51 PM

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**Subject:** FW: FOIA Request - western snowy plover  
**Date:** Tuesday, October 16, 2012 2:37 PM  
**From:** Tom Roth <rothlaw1@comcast.net>  
**To:** Linda McClure <Impatriotdaily@gmail.com>  
**Conversation:** FOIA Request - western snowy plover

Additional response

----- Forwarded Message

**From:** <Mary\_Klee@fws.gov>  
**Date:** Thu, 4 Oct 2012 13:50:34 -0400  
**To:** Tom Roth <rothlaw1@comcast.net>  
**Cc:** <Ernest\_McLaughlin@fws.gov>, <Johnny\_Hunt@fws.gov>, <Helen\_Speights@fws.gov>  
**Subject:** Fw: FOIA Request - western snowy plover

Dear Mr. Roth,

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Mary Klee, Biologist  
U.S. Fish & Wildlife Service  
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----- Forwarded by Mary Klee/ARL/R9/FWS/DOI on 10/04/2012 01:12 PM -----

**Ernest McLaughlin/ARL/R9/FWS/DOI 10/03/2012 11:04 AM**

To

Mary Klee/ARL/R9/FWS/DOI@FWS, Helen Speights/ARL/R9/FWS/DOI@FWS

cc

Johnny Hunt/ARL/R9/FWS/DOI@FWS

Subject

Fw: FOIA Request  
Mary and Helen,

Please see email below from Tom Roth requesting the status of his request. Request was sent to ES on 08-27-12. Please send Mr. Roth the current status information for his request and let us know when you have responded. Thanks.

E. Ray McLaughlin, Alternate FOIA Officer  
U.S. Fish and Wildlife Service  
Division of Information Resources & Technology Mgmt.  
4401 N. Fairfax Drive, Mailstop Rm 380  
Arlington, VA 22203  
Email: Ernest\_McLaughlin@fws.gov  
Tel: 703-358-2698 Fax 703-358-2251

----- Forwarded by Ernest McLaughlin/ARL/R9/FWS/DOI on 10/03/2012 11:00 AM -----

Tom Roth <rothlaw1@comcast.net> 10/02/2012 05:03 PM

To

<R9FOIA@fws.gov>

cc

Subject

Re: FOIA and Fee Waiver Request

I have not received any response from Fish and Wildlife to this request.

Tom Roth  
Law Offices of Thomas D. Roth  
One Market, Spear Tower, Suite 3600  
San Francisco, CA 94105  
415 293-7684  
415 435-2086 (Fax)

On 8/23/12 11:01 AM, "R9FOIA@fws.gov" <R9FOIA@fws.gov> wrote:

Dear Mr. Roth,

This is acknowledgement of receipt of your FOIA request dated August 22, 2012, for all documents, including emails, memos, notes or letters, to or from Gary D. Frazer, or authored by Gary D. Frazer, U.S. Fish and Wildlife Service Assistant Director for Endangered Species, concerning the western snowy plover, dated from Jan. 1, 2008 to the date of this FOIA request. Your request has been assigned the following tracking number: FWS-2012-01232. Please refer to the tracking number in all correspondence. Your requests will be forwarded to the appropriate program or office for direct response to you. If you have any questions, please contact us. Thank you.

**Privacy Act Notice**

*Please be advised that any electronic FOIA request you submit and/or your paper*

*FOIA request may be scanned for ease of transfer to the 'office(s) of record' and in*

*order to store in the Department of Interior's (Department) mandatory Electronic FOIA Tracking System. What this means: is that we may share any personal information you provide in your request (including electronic address, bank*

*account, charge card or social security number) with others within the Department involved in processing FOIA requests. Though we will make every*

*effort to protect your privacy, we urge you NOT to include any personal information in your request – if it is not needed for processing. The Department's FOIA request tracking systems are authorized and included under "DOI—71, Freedom of Information Request File System."*

E. Ray McLaughlin, Alternate FOIA Officer  
U.S. Fish and Wildlife Service  
Division of Information Resources & Technology Mgmt.

4401 N. Fairfax Drive, Mailstop Rm 380

Arlington, Virginia 22203

**Tom Roth** <rothlaw1@comcast.net> 08/22/2012 04:32 PM

<osfoia@ios.doi.gov>, <r9foia@fws.gov>, <Larry\_Buklis@fws.gov>

FOIA and Fee Waiver Request

To  
cc  
Subject

Please find attached a FOIA and fee waiver request.

Tom Roth  
Law Offices of Thomas D. Roth  
One Market, Spear Tower, Suite 3600  
San Francisco, CA 94105  
415 293-7684  
415 435-2086 (Fax)  
<http://www.rothlaw1.com/> <<http://www.rothlaw1.com/>>  
<<http://www.rothlaw1.com/>> <<http://www.rothlaw1.com/>>

----- End of Forwarded Message